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IN THE

Supreme Court of the United States

October Term, 1961

No. 231

UNITED STATES LINES COMPANY,
Petitioner,

against

JULIO DINIERO,
Respondent.

BRIEF OF RESPONDENT, JULIO DINIERO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Point I—The Decisions Uniformly Hold That a Federal Trial Judge has Inherent Power to Withdraw an Improper Interrogatory 2

Point II—The Withdrawal of All the Interrogatories did not Precipitate an Immediate Verdict, and the Record of the Jury's Deliberation Thereafter Negates a Verdict Under Judicial Duress or one Based on Sympathy or Prejudice 5

Point III—There is no Conflict Between the Opinion of the Court of Appeals For the Second Circuit, and the Courts Of Appeals of any other Circuit 8

Point IV—The Power of a Trial Judge to Exercise the Discretion Granted Him by Rule 49(b) of the Federal Rules of Civil Procedure, Should Not Be Whittled Down 10

Conclusion 16

Table of Cases Cited

Allis v. United States (1894), 155 U. S. 117, 123, 15 S. Ct. 36 2

Bartholomew v. Universe Tankships, S. D. N. Y. (1957), 168 F. Supp. 153, 160 aff'd 2 Cir. (1959), 263 F. 2d 437, 448 11

Continental Life Ins. Co. v. Yung (1888), 113 Ind. 159, 15 N. E. 220, 222 4

Culver v. Lehigh Valley Transit Co. (1936), 322 Pa. 503, 186 Atl. 70 13

Fitts v. Badger Lumber & Coal Co. (1937), 146 Kan. 56, 68 P. 2d 631 14

Goode v. Ramey (1932), 48 S. W. 2d 719 3

PAGE

LaFayette v. Bass (1926), 122 Okla. 182, 252 Pac. 1101 14

Longstean v. Owen McCaffrey's Sons (1920), 95 Conn., 486 111 Atl. 788, 794 ..... 4, 13

Matthews v. Town of Sigel (1913), 152 Wisc. 125, 139 N. W. 721 ..... 3, 4

New York County National Bank v. American Surety Company of New York, 1st Dept. 1092, 69 App. Div. 153, 74 N. Y. Supp. 692, 695, aff'd 1093, 174 N. Y. 544 12

Orthopedic Equipment Co. v. Eutsler, 4 Cir. (1960), 276 F. 2d 455, 463 6

Poer v. Madison River Power Co. (1910), 41 Mont. 236, 108 Pac. 645, 648 ..... 3, 14

Ratigan v. New York Central Railroad Co., — F. 2d — (C. A. 2d, decided June 26, 1961 — not officially reported) 15

Robinson v. Palatine Ins. Co. (1901), 11 N. M. 162, 66 Pac. 535, 538 ..... 4, 15

Robinson v. Silver Lake (1931), 163 Wash. 31, 299 Pac. 356, 358 ..... 4, 14

St. Louis-San Francisco Ry. Co. v. Simons, 10 Cir. (1949), 176 F. 2d 654, 660 11

Silverman v. Travelers Ins. Co., 5 Cir. (1960), 277 F. 2d 257 6

Taylor v. Ketchum (1868), 28 N. Y. Super. Ct. (5 Rob.) 507, 514; 35 How. Prac. 289, 296 12

Union Pacific R. R. v. Bridal Veil Lumber Co., 219 F. 2d 825 (C. A. 9th, 1955), cert. den. 350 U. S. 981 (1956) 8

Walz v. Fidelity Phoenix Fire Insurance Co. of N. Y., 10 F. 2d 22 (C. A. 6th, 1926) cert. den. 271 U. S. 665 (1926) 9

PAGE

Watkins v. Mountain Home Cooperative Irr. Co., (1921), 33 Idaho 623, 197 Pac. 247 13

Wavle v. Michigan United Ry. Co., 1912, 170 Mich. 81, 135 N. W. 914, 919 4

Wells Truckways v. Burch, 10 Cir. (1957), 247 F. 2d 194, 198 11

Wilson v. Southern Farm Bureau Casualty Co., 5 Cir. (1960), 275 F. 2d 819 7

Rules Cited

Federal Rules of Civil Procedure:

Rule 49(b) 10

Rule 61 5

Other Authority Cited

89 Corpus Juris Secundum "Trial", Section 550 .. 2

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Statement

The facts and issues were adequately and correctly set forth in the opinion of the Court of Appeals herein, as distinct from the manner in which United States Lines Company has attempted to set them forth in its petition.

This case involves the inherent recognized power of a Trial Judge to correct and simplify the method by which he submits a case for determination by the jury, as a matter of judicial discretion, within the framework, spirit and intent of F. R. C. P. 49(b).

It does not involve a Judge taking a case away from the jury; or any Constitutional or other federal problem of overriding importance to the administration of justice; nor does it involve a matter as to which there is a conflict among the Circuits.

However, petitioner's brief tries hard to make it appear that all of these matters are involved here, in the continued

hope that in this way, it might eventually obtain a new trial in the seaman's personal injury suit, in which the jury returned a general verdict in favor of the injured workman, and against the petitioner steamship company.

We will show that this is not the type of case in which the Supreme Court should grant certiorari.

POINT I

The decisions uniformly hold that a federal trial judge has inherent power to withdraw an improper interrogatory, and to clarify or simplify its instructions to the jury, in order to assist it to arrive at a verdict.

Interrogatory No. 1 was both ambiguous and erroneous, as was recognized by the trial judge and the unanimous verdict of the Court of Appeals. On either count the trial judge had the power to correct, alter, and amend his instructions to the jury by withdrawing the improper interrogatory.

In 89 Corpus Juris Secundum "Trial", Section 550, it is stated:

> "If the court inadvertently submits questions which, on mature deliberation, it concludes are improper, it has the inherent power to withdraw such questions. An interrogatory which does not serve the purpose and functions of interrogatories may, at any time before answer, be withdrawn."

In *Allis* v. *United States* (1894), 155 U. S. 117, 123, 15 S. Ct. 36, the Court approved the standard practice of recalling the jury to recharge them or simplify the issues stating:

> "It is a familiar practice to recall a jury, after they have been in deliberation for any length of time, for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those

> difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment."

In *Goode* v. *Ramey* (1932), 48 S. W. 2d 719, the jury had deliberated for 1½ days when they reported to the trial judge that they could not agree on questions 6 and 7. After inquiring as to the nature and cause of their disagreement the court retired the jury for further deliberation. Thereafter the court recalled the jury, submitted a different and amended question 6 and withdrew entirely question 7. The court held this action was not error.

> "We have found nothing in our statutes that inhibits the trial court on his own motion to correct or modify a charge which has been given to the jury. Indeed, as said in R. C. L. vol. 14, p. 812, the consequences would be highly mischievous if such right did not exist." (p. 722)

In *Poor* v. *Madison River Power Co.* (1910), 41 Mont. 236, 108 Pac. 645, the court upheld the acceptance of a general verdict despite the jury's failure to answer an interrogatory which incorporated several questions. Not unlike the first interrogatory here, it read:

> "Did the witness Barclay, in the presence of Amos R. Howerton, make an experiment and at the same time explain to said Howerton, the dangerous nature of the wire on which Howerton was killed?" (p. 648)

The Court stated:

> "The direct tendency of such an interrogatory was to confuse the jury * * * and, if upon further consideration of it the court had formally withdrawn it from the jury, no valid objection could have been taken to its action." (p. 648)

In *Matthews* v. *Town of Sigel* (1913), 152 Wisc. 123, 139 N. W. 721, the court held that no error was committed when

the trial judge withdrew a special interrogatory relating to an evidentiary fact, stating:

> "It is the duty of trial courts to correct or perfect the verdict at any time before it is accepted from the jury as the verdict in the case, provided it is done in such a manner as not to prejudice the rights of parties." (p. 724)

In *Robinson* v. *Palatine Ins. Co.* (1901), 11 N. M. 162, 66 Pac. 535, 538, the court stated:

> "• • • we further hold that if the court inadvertently submits to the jury questions which, on mature deliberation, it concludes are not proper ones to be submitted to them, it has the inherent power to withdraw such questions from their consideration • • •." (p. 538)

In short, state courts have consistently upheld the withdrawal before verdict of improper interrogatories, *Continental Life Ins. Co.* v. *Yung* (1888), 113 Ind. 159, 15 N. E. 220, 222; which do not serve the purpose and function of interrogatories, *Longstean* v. *Owen McCaffrey's Sons* (1920), 95 Conn. 486, 111 Atl. 788, 794; or which embrace an evidentiary fact, the answer to which would not be controlling on the general verdict, *Robinson* v. *Silver Lake* (1931), 163 Wash. 31, 299 Pac. 356, 358; *Matthews* v. *Town of Sigel* (1913), 152 Wis. 123, 139 N. W. 721, 724; *Wavle* v. *Michigan United Ry. Co.* (1912), 170 Mich. 81, 135 N. W. 914, 919.

The action of the trial court below in withdrawing the first interrogatory because it did not wish, under the circumstances, to rephrase it, and consequently its decision simultaneously to withdraw all the other interrogatories, was a reasonable exercise of discretion, under the circumstances of this case.

POINT II

The withdrawal of all the interrogatories did not precipitate an immediate verdict, and the record of the jury's deliberation thereafter negates a verdict under judicial duress or one based on sympathy or prejudice.

The time-table chronology of events, establish beyond cavil that the judge's action could not have prejudiced any of the rights of either party.

2:45 P. M. jury commenced deliberations (15a).

5:45 P. M. Judge Murphy's attempted clarification of "had" in Interrogatory One (15a).

6:40 P. M. Withdrawal of interrogatories (18a).

9:22-9:30 P. M. "Allen" charge to Jury (20a-22a).

10:30 P. M. Jury renders verdict (22a).

While no reported federal cases deal directly with the application of the Harmless Error doctrine to withdrawal of an interrogatory, the mandate of Rule 61 F. R. C. P. that no judgment shall be disturbed for "any error or defect in the proceeding which does not affect the substantial rights of the parties", clearly applies herein.

F. R. C. P. 61:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The federal cases dealing with supplemental and "Allen" charges show that to constitute reversible error it must be shown that the action of the judge "blasted" the jury to action by judicial coercion in disregard of the jury's fact-finding function. Such is not the situation in the instant case.

In *Silverman* v. *Travelers Ins. Co.* (5 Cir. 1960), 277 F. 2d 257, the appellants objected to the so-called "dynamite charge" or "telescopic charge" the trial judge gave in his supplementary charge to the jury. The Fifth Circuit affirmed the jury verdict and held that the judge's supplementary charge did not prejudice the appellant:

> "Although it is better practice to avoid supplementary charges, the propriety of such charges rests largely in the discretion of the trial judge. We find that the charge did not blast the jury into action in any way prejudicial to the plaintiffs and that the trial judge did not blur the issues by the alleged telescoping of charges." (p. 264)

The fact that the jury here reported, "Your Honor, we cannot agree on question one. It appears that there is no chance for agreement. Foreman." (24a) was not conclusive upon the court, any more than any other report from a jury that it cannot agree. It is precisely where the jurors have reported "deadlock" that the appellate courts have sustained the further efforts of the trial judge to obtain a verdict.

In *Orthopedic Equipment Co.* v. *Eutsler* (4 Cir. 1960), 276 F. 2d 455, 463, Sobeloff, *C. J.*, stated:

> "Nor was the Allen charge inappropriate, as the defendant argues, simply because the foreman of the jury had reported the jurors hopelessly deadlocked. As a practical matter, the charge is customarily given only when the jury appears to have encountered difficulties in reaching unanimity. If the distinction suggested by the defendant were correct, the court would be precluded from giving the charge in the

> very circumstances when it is needed most. Moreover, the decisional law supports the use of the instruction in a case in which the jury has previously indicated its difficulty." (p. 463)

In *Wilson* v. *Southern Farm Bureau Casualty Co.* (5 Cir. 1960), 275 F. 2d 819, the jury foreman reported to the judge that the jury was unable to agree ("impossible"). The judge thereupon gave the *Allen* case charge, to which counsel for both parties objected, and 14 minutes later the jury returned with a verdict for the defendant. The court affirmed the judgment and held that the "impossibility" of jury agreement did not deprive the trial judge of discretion to continue the deliberations and act to avoid a mistrial.

> "The appellant insists that, when the foreman advised the court that it was 'impossible' to arrive at a verdict, it became the court's duty to enter an order of mistrial. Clearly, however, it was for the court, in the exercise of its informed discretion, to determine when the deliberations had proceeded long enough. The charge given by the court was modeled upon that approved in Allen v. United States * * *." (p. 823)

The interrogatories in the instant case were withdrawn four hours after they had been given but no quick verdict resulted. It was another four hours before the jury reached its obviously deliberated general verdict (22a-23a), and then only after the trial judge had given the traditional *Allen* charge (21a-22a). Here, the withdrawal of the interrogatories, obviously did not galvanize the jury into a precipitous decision.

POINT III

There is no conflict between the opinion of the Court of Appeals for the Second Circuit, and the Courts of Appeals of any other circuit.

Petitioner claims that *Union Pacific R.R.* v. *Bridal Veil Lumber Co.*, 219 F. (2d) 825 (C. A. 9th, 1955), cert. den. 350 U. S. 981 (1956) is in conflict with the opinion of the Court of Appeals for the Second Circuit in this case. We believe that it has misread that case. The *Bridal Veil* case involved a subrogated claim to recover damages for negligence, based on a railroad crossing accident. The jury was given a series of special written interrogatories. It failed to reach agreement on one question, and failed to answer another, although the rest of the interrogatories were answered. Based on the answers which the jury did give, the Trial Judge felt justified in going ahead and entering judgment. On appeal, this was held to be error, for the unanswered interrogatories posed vital factual questions which required determination by the jury, not the Court. In that case, the unanswered interrogatories involved were not ambiguous, nor did the Trial Judge make any attempt to withdraw them. Unlike the case at bar, the Judge there did not send the jury back, nor did he request that it return a general verdict. In other words, in that case, the Trial Judge substituted his own determination on factual matters which were within the jury's province. This was correctly held to be error, requiring the case to be sent back for a new trial. In reaching that conclusion, the Court recognized the general rule, when it stated at page 831:

> "• • • But when the jury is in disagreement as to one question, when it is readily apparent that the failure to answer one question is not an oversight, and it is apparent the disagreement has lasted for some time, it is peculiarly the function of the trial judge to decide whether to discharge the jury or, within the limits of legitimate wheedling, try to get the jurors to agree on an answer. It may be assumed

> that counsel for Union Pacific, outside the presence of the jury, could have made a request to the court that the jury be returned to its room for further deliberation; yet under the circumstances it cannot be said that a failure to make such a request was the waiver of a right. * * * "

Petitioner also incorrectly claims that there is a conflict between the opinion of the Court of Appeals in the instant case, and that of the Court of Appeals for the Sixth Circuit in *Walz* v. *Fidelity-Phoenix Fire Insurance Co. of N. Y.*, 10 F. (2d) 22 (C. A. 6th, 1926), cert. den. 271 U. S. 665 (1926). Here also, there is no conflict. The *Walz* case involved an action to recover for a fire loss under a policy. The jury was out deliberating for two days, and then announced that it could not reach agreement. Counsel for both sides agreed that the jury was hopelessly deadlocked and should be discharged. Nevertheles, the Trial Judge directed that certain additional witnesses be brought in to testify before the jury, stating that the Court would not permit evidence to be suppressed. The newly produced witnesses then testified for the first time, following which the jury rendered a verdict. On appeal, this procedure was held to constitute error, because (a) the attorneys had a right to decide which witnesses they wanted to call, without being accused of suppressing material evidence; and (b) if the Trial Judge wished the witnesses to be heard, he should have directed that they be called to testify *before* the case was submitted to the jury, not *after* the jury had already been deliberating for over forty-eight hours.

As can be seen, the *Walz* case, like the *Bridal Veil* case, did not involve any question of whether a Trial Judge has a discretionary right to withdraw an ambiguous interrogatory, and then direct the jury to return a general verdict. On that issue there is no conflict in the Circuits.

POINT IV

The power of a Trial Judge to exercise the discretion granted him by Rule 49(b) of the Federal Rules of Civil Procedure, should not be whittled down.

The power to withdraw is implicit in the very provisions of Civil Rule 49(b).[1] It need not be derived only from the initial discretion "The court may submit". It is also to be inferred particularly from the expressed additional discretion vested in the court " • • • When the answers are consistent with each other but one or more is inconsistent with the general verdict, • • • When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court • • • may return the jury for further consideration of its answers and verdict • • •."

Answers to interrogatories which are inconsistent with each other or with the general verdict, necessarily reflect a jury's failure to understand either the issues, the court's

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[1] R. C. P. 49(b) "The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

oral charge, the meaning of the interrogatories, or their legal effect. Under Rule 49(b) the court may explain to the jurors the nature of their inconsistent findings, and direct the jury to reconsider and reconcile them.[2] If this be so, is it not an *a fortiori* conclusion that the judge who may explain and return inconsistent findings to the jury to save a verdict or avoid a new trial, may, for the same reasons, withdraw the interrogatories before the jury brings in its verdict?

In *Wells Truckaways* v. *Burch*, *supra*, the jury came in with two verdicts—one for the plaintiff for $50,000 and one for the defendant for $4,982.81 on the counterclaim. The court explained to the jury that if it found for the defendant on the counterclaim based on plaintiff's breach of contract, it would foreclose their findings for the plaintiff. The judge sent the jury back to reconsider. The jury came back with a new single verdict of $45,017.19—the net figure of the two prior verdicts. The appellate court affirmed:

> "Assuming that the two verdicts were inconsistent, the intention of the jury was clear and the court was well within its discretion in refusing to enter the verdicts and directing the jury to resume its deliberations and clarify its verdict, rather than make the correction itself. 'Until a verdict has been received and recorded, it is not final and is subject to correction'." (p. 198)

Similarly, in *Bartholomew* v. *Universe Tankships*, *supra*, the jury agreed on a general monetary verdict for the plaintiff but left unanswered the six assigned interrogatories since they believed they did not have to answer

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[2] *St. Louis-San Francisco Ry Co.* v. *Simons* (10 Cir. 1949), 176 F. 2d 654, 660; *Wells Truckaways* v. *Burch* (10 Cir. 1957), 247 F. 2d 194, 198. See also, *Bartholomew* v. *Universe Tankships* (S. D. N. Y. 1957), 168 F. Supp. 153, 160, aff'd (2 Cir. 1959), 263 F. 2d 437, 448, sustaining the court's belated acceptance of answers to interrogatories after the general verdict.

them. The trial judge directed the jury to answer the special questions with the admonition that if they answered questions two or three in the negative "then there can be no verdict for the plaintiff" (p. 160). The jury then answered all the questions consistent with the general verdict. This court held that no error was commited by the trial judge.

In the leading case of *New York County National Bank* v. *American Surety Company of New York* (1st Dept. 1902), 69 App. Div. 153, 74 N. Y. Supp. 692, 695, aff'd (1903), 174 N. Y. 544, the jury rendered a general verdict for the plaintiff and answered the first and third special interrogatories, reporting disagreement on the second. The trial court withdrew the second interrogatory and entered judgment on the general verdict. This was affirmed on appeal, the court stating:

> "The jury rendered a general verdict in favor of plaintiff, and answered the first question in the affirmative, and the third in the negative, but were unable to agree on the second. The court accepted the verdict, and relieved the jury from answering the second question, to which ruling appellant's counsel excepted. This exception presents no error. It was discretionary with the court whether to require the jury to render a special verdict on any question, in addition to the general verdict, and it was equally discretionary with the court to withdraw one or all such special questions from their consideration." (p. 695)

In *Taylor* v. *Ketchum* (1868), 28 N. Y. Super. Ct. (5 Rob) 507, 514; 35 How. Prac. 289, 296, the trial court withdrew from the jury a special issue which it had previously framed for the jury to answer. The Superior Court found no error in the trial court's action, basing its decision on the discretionary nature of the submission of the issue to the jury in the first place.

> "The court withdrew the first question in writing from the consideration of the jury, and instructed

> them they need not answewer it. This, we think, the court had a right and power to do; and was purely a matter of discretion over which we have no control." (p. 514)

Other state jurisdictions have been in accord with Massachusetts and New York in upholding the trial judge's right to withdraw interrogatories.

In *Longstean* v. *Owen McCaffrey's Sons* (1920), 95 Conn., 486, 111 Atl. 788, 794, the Connecticut court stated:

> "When and to what extent they (interrogatories) shall be allowed is within the reasonable discretion of the trial court (cit. omitted).
>
> "It would follow that the trial court may at any time before answer is made by the jury withdraw them from the consideration of the jury; and, if the discretion thus exercised is reasonable, reversible error cannot be predicated upon this action." (p. 794)

In *Culver* v. *Lehigh Valley Transit Co.* (1936), 322 Pa. 503, 186 Atl. 70, the Pennsylvania court indicated that it would not insist upon having the jury answer a special finding and would permit the trial judge to enter judgment in accordance with the general verdict for the plaintiff, even though the special question related to what the jury found to be the negligence of the defendant.

In *Watkins* v. *Mountain Home Cooperative Irr. Co.* (1921), 33 Idaho 623, 197 Pac. 247, the Idaho court held that under its broad statutory discretionary provision (not dissimilar to Rule 49) whether to submit such questions:

> "is a matter within the discretion of the court • • •. Neither party can require it as a matter of right. That submission being discretionary, they can be withdrawn by the court at any time, before the special findings are given, and such withdrawal furnishes no ground for exception." (pp. 250-251)

See also *Fitts* v. *Badger Lumber & Coal Co.* (1937), 146 Kan. 56, 68 P. 2d 631, where the Kansas court upheld the withdrawal of special questions which the jury had failed to answer prior to rendering their general verdict.

In *LaFayette* v. *Bass* (1926), 122 Okla. 182, 252 Pac. 1101, the court affirmed the judgment entered on the general verdict for the plaintiff even though the jury had answered interrogatory one "can't agree", and such interrogatory was concededly material and proper. The Oklahoma court analyzed the situation as the same as failure to answer or withdrawal of the interrogatory and that under the discretionary State statute (similar in breadth and scope to Rule 49) the trial judge could withdraw the interrogatory from the jury.

In *Robinson* v. *Silver Lake Ry. & Lumber Co.* (1931), 163 Wash. 31, 299 Pac. 356, 358, the Washington court states the general rule giving its trial judges the power to withdraw interrogatories, as follows:

> "It is the settled law of this court that it is discretionary with the trial judge * * * to withdraw interrogatories theretofore submitted, and his action in that regard will not be reviewed except for abuse of discretion."

The court also pointed out that where, as in the case at bar, the general verdict encompassed the ultimate facts of the case for the jury to determine, the withdrawal of the interrogatories was clearly not error.

In *Poor* v. *Madison River Power Co.* (1910), 41 Mont. 236, 108 Pac. 645, 648, the Montana court, in addition to holding that the trial court has an inherent right to withdraw an improperly formulated interrogatory, also stated a broader rule:

> "Even had it been in proper form, its withdrawal could not have been made the ground of exception because, it being within the court's discretion to

> submit it in the first instance, it could likewise in its discretion withdraw it."

Likewise, in *Robinson* v. *Palatine Ins. Co.* (1901), 11 N. M. 162, 66 Pac. 535, after the jury reported that they could not answer the interrogatories, the trial judge withdrew them because they were improper. The Syllabus by the New Mexico Supreme Court states:

> "If the court submits questions to the jury, it can withdraw them, if it sees fit, from their consideration; and if the jury return a general verdict ignoring the questions, and the judge accepts the verdict as returned and discharges the jury, it is the same as though the court had refused to submit them in the first instance." (p. 535)

Radigan v. *New York Central Railroad Co.*, — F. (2d) — (C. A. 2d, decided June 26, 1961—not yet officially reported), was an *F.E.L.A.* case. The Trial Judge submitted specific written questions to the jury. He later realized that some of these questions were somewhat "unnecessary", "improper", and even "inconsistent". The majority of the Court held that the Trial Judge had acted within his rights in disregarding the jury's answers to those questions which were improper, provided that otherwise the jury answered the pertinent questions adequately, so that the jury, and not the Judge, determined all the important questions of fact.

We would not wish to conclude our discussion of the court cases solely with a case by case analysis. In fact, we have serious doubt as to the value of our research. After one has waded through several hundred decisions on unanswered interrogatories, a more important concept begins to crystallize. By definition, there can be no finite standards to measure what shall constitute the reasonable exercise of discretion in this or any other area. The best judicial minds can reasonably disagree in any particular

discretionary exercise. Uniformity of decision should therefore not be anticipated; neither should conflict surprise. But in the great totality of cases, essential justice is achieved precisely because there is the discretion in the trial judge to gauge his decisions to the ever unique complex of factors before him. How long a divided jury should be encouraged to deliberate; when should a halt be called; in what fact patterns to employ a general charge; where to control the jury by interrogatories, and in what number, these and myriad others are the non-measurable variables which constitute the judicial burden. Ground rules there must be. But where no two cases, juries or judges, can ever be the same, would it not be a serious disservice needlessly to fetter the trial judge and limit his flexibility? When, as here, exigencies arise requiring prompt judicial action, who but the trial judge should be trusted to decide on what measures to employ as will prevent frustration, within the framework, spirit and intent of F. R. C. P. 49(b)?

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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